CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 323

FAIRCHESTER OIL CO., INC.,
Petitioner,

against

FIRST NATIONAL BANK OF NEW ROCHELLE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF

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August 4, 1944.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Fairchester Oil Co., Inc. respectfully prays that a writ of certiorari issue to review a judgment of the Supreme Court of the State of New York, County of Westchester, entered in the above action on June 5, 1944, upon the remittitur of the Court of Appeals of the State of New York, affirming a judgment of the Appellate Division of the Supreme Court of the State of New York for the Second Department which reversed a judgment at Trial Term of said Supreme Court of the State of New York, Westchester County, dismissing the complaint in said action, and directed judgment in favor of the respondent and

against petitioner for the relief demanded in the complaint therein. A certified transcript of the record is furnished herewith in accordance with Rule 38, par. 1, of the Rules of this Court.

STATEMENT

This case involves whether a lease of certain premises for use as a gasoline filling and service station, permitting cancelation if "at any time * * * the use of said premises as an oil and gasoline filling and service station * * * is prohibited, limited or restricted by governmental authority * * *", could properly be terminated by reason of regulations issued under the Second War Powers Act (56 Stat. 176, 50 U. S. C. § 631) by the War Production Board and by the Office of Price Administration of the United States Government.

In March, 1942, the War Production Board, Division of Industry Operation, issued "Limitation Order L-70", which limited the quantity of gasoline to be delivered to any service station to 80% of the "normal gallonage" of the station and restricted the hours of operation of a station to not more than 12 hours of any calendar day or not more than 72 hours in any calendar week (7 Fed. Reg. 2103-2105). Thereafter, during the next succeeding four months, the delivery of gasoline to service stations was further limited by amendments to Order L-70 to 50% of the "normal gallonage" (7 Fed. Reg. 2722, 3549-3550, 4171, 5552-5556) until July, 1942, when the "Gasoline Rationing Regulations" of the Office of Price Administration became effective (7 Fed. Reg. 5216, 5225-5243).

During the period involved in this litigation, the latter regulations did not change the 12 and 72 hour restrictions during which service stations could distribute gasoline, but did introduce the "coupon" rationing system. Such system further restricted the basis upon which stations could obtain gasoline. They provided, speaking generally, for the issuance of basic rations, and in some instances supplementary rations, to owners of all motor vehicles. They further provided for delivery of motor fuel to service stations only in such quantities as was represented by consumer coupons which the stations had to surrender to the wholesaler who made delivery.

The Trial Court decided this action in favor of the petitioner (R 15), with an opinion (R 70-72) to the effect that the foregoing regulations restricted the use of the premises as a gasoline filling and service station and permitted termination.

The Appellate Division reversed (R 84-85) without, we respectfully submit, giving adequate consideration to the important issues involved. This is evidenced by the fact that it adopted a "per curiam" opinion (R 79-81) in which, after quoting the material clause permitting termination if

> "the use of said premises as an oil and gasoline filling and service station * * * is prohibited, limited or *restricted* by governmental authority",

the Court concluded that there was no right to terminate for the reason, as expressed by the Court (R 81), that

> "these regulations did not prohibit nor make illegal the business of the defendant, but merely *restricted* it".

The Court of Appeals affirmed the Appellate Division without opinion (R 88-89). It held, therefore, that none of the above-described regulations justified cancelation of the lease herein.

Precisely the contrary was held by the Supreme Court of Minnesota in a detailed and well reasoned opinion in *Orme* v. *Atlas Gas & Oil Co.*, Minn. , 13 N. W. (2d) 757 (March 24, 1944). Unfortunately, this decision by Minnesota's highest Appellate Court had not been reported at the time briefs were submitted, or at the time oral argument was had, in the Court of Appeals. Photostatic copies of the decision, however, were sent to the Court of Appeals as soon as it came to our attention, approximately one week prior to the affirmance of the judgment herein by said Court.

We submit that this case merits review, particularly in view of the conflict of decisions now existing. Leases of the character involved here and in the *Orme* case are well known throughout the oil industry. It is altogether unsatisfactory that the right to terminate them by reason of action of the Federal government should vary among the individual States.

THE FACTS

Respondent's assignor, as landlord, and petitioner, as tenant, entered into a written lease on November 6, 1935, covering premises on the East Boston Road at Mamaroneck, New York, to be used as a gasoline filling and service station (R 48-56). The lease was to run for approximately 10 years and was to expire on March 31, 1945 (R 49). The rental provided in the lease was based upon the gallonage sold, with a guaranteed minimum (R 49-50).

Paragraph 10 of the lease gave petitioner an option to cancel under the following circumstances (R 53):

> "10. If at any time after the execution of this lease by the Lessee, the use of said premises as an oil and gasoline filling and service station or the driveways and/or approaches thereon or thereto is prohibited, limited or restricted by governmental authority or by decree of any court or for any other cause except on account of the Lessee's fault or neglect, or if at any time during the term of this lease any portion of said premises is taken by lawful authority for any public improvement and the remaining portion thereof not so taken shall not be sufficient, in the Lessee's opinion for the Lessee to conduct its business thereon, then the Lessee shall have the option of terminating and cancelling this lease on and as of the date the right to maintain said station, driveways or approaches is so denied or said premises are so taken. In the event of termination or cancellation for any of the causes enumerated in this paragraph the Lessee shall be liable only for the rental accrued and earned to the date of termination and cancellation of this lease."

On or about April 1, 1942, following the issuance of Limitation Order L-70 by the War Production Board, petitioner removed its fixtures, boarded up and abandoned the premises (R 24-25); but petitioner did not deliver up to respondent the keys to the premises until July 25, 1942 (R 28-29).

Meanwhile, respondent brought a series of four actions against petitioner for rent due from April through July, 1942 (R 16-19). None of these four actions is before the Court.

We are here concerned solely with the action originally numbered as Action 5, commenced by respondent subsequent to its receipt of the keys to the premises on July 25, 1942, for rent claimed to be due on August 10, 1942, and September 10, 1942, for the months of August and September, 1942 (R 12, 6, 7, 9). Petitioner defended this action on the ground that it had a right to terminate the lease by reason of the Federal regulations heretofore described, and that it did so terminate no later than July 25, 1942 (R 12, 63-69).

JURISDICTION

Jurisdiction of this Court is invoked under Judicial Code § 237 (b), as amended (36 Stat. 1156, 38 Stat. 790, 39 Stat. 726, 42 Stat. 366, 43 Stat. 937, 45 Stat. 54, 28 U. S. C. § 344 (b)).

QUESTION PRESENTED

Whether in a contract of lease expressly allowing cancelation if "at any time * * * the use of said premises as an oil and gasoline filling and service station * * * is prohibited, limited or restricted by governmental authority * * *", the Courts may properly hold that the privilege of cancelation is excluded where the limitations and restrictions relied upon are those of the War Production Board and of the Office of Price Administration of the United States Government.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The State Court has decided a Federal question of substance not heretofore determined by this Court.

2. Conflicting decisions by the highest appellate Courts of two States with respect to a Federal question of public importance calls for an exercise of this Court's power of supervision.

3. The decision in this case is not in accord with applicable decisions of this Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of the State of New York, County of Westchester, White Plains, New York, commanding said Court to certify and send up to this Court on a date to be designated, a full and complete transcript of the record and of all proceedings had in this case, to the end that this case may be reviewed and determined by this Court; that the judgment below be reversed; that the judgment entered April 5, 1943 dismissing the complaint in this action on the merits be reinstated and affirmed; and that your petitioner be granted such other and further relief as may seem proper.

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August 4, 1944.